Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STERLING S. MILLER; CLARENCE WOODRUFF; PAULA J. CARTER; WILLIAM L. CLAY, JR.; and KENNETH JONES,

Petitioners,

v.

VINCENT C. SCHOEMEHL, THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS CITY, and CITY OF ST. LOUIS, a municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the federal commor. law of *res judicata*, under a theory of "virtual representation," bar a plaintiff from pursuing a claim that was litigated in a prior proceeding where the plaintiff in the prior suit had a "commonality of interests" with, but no express or implied relationship of accountability to, the plaintiff in the second suit?

2. Does the federal common law of *res judicata*, under a theory of "virtual representation," bar a plaintiff from pursuing a claim that was litigated in a prior proceeding where the plaintiff in the prior suit failed to prosecute with due diligence and reasonable prudence so that the common issues were not given full and fair consideration?

3. Does the federal common law of *res judicata*, under a theory of "virtual representation," bar a plaintiff from pursuing a claim that was litigated in a prior proceeding where he received no notice that the prior proceeding would conclusively determine his rights and was given no opportunity to protect his rights either by joining in the suit or opting out of the suit?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were petitioners Sterling S. Miller, Clarence Woodruff, Paula J. Carter, William L. Clay, Jr., and Kenneth Jones, and respondents Vincent C. Schoemehl, Thomas A. Villa, Board of Aldermen of the City of St. Louis, Board of Election Commissioners of St. Louis City, and City of St. Louis.

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PETITION FOR WRIT OF CERTIORARI

Sterling S. Miller, Clarence Woodruff, Paula J. Carter, William L. Clay, Jr., and Kenneth Jones respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit together with the Court of Appeals' order denying petitioners' suggestion for rehearing *en banc* are reported at 93 F.3d 449 and appear as Appendix A to this petition. The opinion for the District Court for the Eastern District of Missouri granting defendants' motion for summary judgment is unpublished and appears as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1996. Appellants were granted an extension, and on September 12, 1996, timely filed a petition for rehearing *en banc*. Appellants' petition was denied on October 28, 1996. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

A. *Nature of the Case.*

This is a case in which the five petitioners were held to have had their rights definitively and absolutely determined by the judgment in a lawsuit, even though they were not parties to that lawsuit and were denied an opportunity to participate in the lawsuit.

B. *Statement of the Facts.*

On December 20, 1991, the St. Louis Board of Aldermen adopted new aldermanic ward boundaries in accordance with the 1990 census figures (6).[1] The 1991 map will govern aldermanic elections through April, 2001, which is before the issuance of the next census, and therefore will define the composition of the Board of Aldermen that will redistrict the city for the next decade. Art. I, §3, Charter of City of St. Louis.

Two lawsuits were brought to challenge the redistricting: the *AAVR* lawsuit and the present case ("the *Miller* lawsuit").

The *AAVR* complaint was filed in January, 1992, by a voting rights organization and 15 African-American voters who alleged that the 1991 St. Louis ward map violated §2 of the Voting Rights Act, 42 U.S.C. §1973, and the one-person, one-vote standard of the Fourteenth

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[1] Citations are to the pages of the record appendix filed with the Eighth Circuit ("___"), or to the record below ("R. ___"), or to the appendix to this petition ("App. ___"). The trial judge took judicial notice of the file in *AAVR* (App. B-2, n. 1) and citations to the record appendix filed with the Eighth Circuit in *AAVR* are ("*AAVR* ___").

Amendment of the United States Constitution (10-27). Although the suit was brought as a class action, no motion to certify a class was ever filed.

The *Miller* lawsuit originated in early spring 1992 when petitioners Miller, Woodruff, and Carter ("the Miller plaintiffs")—approached Chicago attorney Judson Miner regarding the filing of a challenge to the 1991 St. Louis map. At about the same time that the Miller plaintiffs approached Mr. Miner, a dispute arose in the *AAVR* lawsuit between five of the named plaintiffs and counsel in that case regarding (a) the appropriate strategy for pursuing the case; and (b) the possibility that the lead attorney had a conflict of interest (29, 49, 52, 56, and 63). As a result of this dispute, these five *AAVR* plaintiffs (the "Bosley plaintiffs") discharged their original lawyers on or about April 24, 1992 (63), and asked Mr. Miner if he would represent them. Because the attorneys in *AAVR* refused to withdraw their appearances for the Bosley plaintiffs or to agree to the substitution or addition of Mr. Miner in *AAVR* (63), Mr. Miner agreed to add the Bosley plaintiffs as additional plaintiffs to the complaint he was drafting for the Miller plaintiffs, provided that they would (a) seek leave to withdraw from the *AAVR* case; and (b) move to consolidate the two cases before Judge Hamilton, the judge to whom the *AAVR* case had been assigned, so that there was no appearance of forum shopping. The *Miller* complaint was filed on April 27, 1992 and assigned to Judge Filippine (1-9).

1. *The procedural history of AAVR in the district court.* On May 5, 1992, the Bosley plaintiffs filed a *pro se* motion to voluntarily withdraw from the *AAVR* lawsuit and have their claims dismissed without prejudice so they could proceed in the *Miller* lawsuit (28-32) and

moved to have *Miller* consolidated with *AAVR* before Judge Hamilton (33-37). The defendants opposed both the motion to withdraw and the motion to consolidate (57). After the *Miller* complaint and the Bosley plaintiffs' motions in *AAVR* had been filed, but before any judicial action had been taken in either case, the Bosley plaintiffs discovered that counsel in *AAVR* had failed to file a brief in opposition to a motion for summary judgment filed by defendants on February 19, 1992, before any discovery on the *AAVR* plaintiffs' voting rights claims.[2] The lawyers for the *AAVR* plaintiffs did not respond to the motion for summary judgment until April 27, 1992, at which time they filed only the affidavit of one Dr. Charlene Jones (38-40). The Jones affidavit consisted of an unorthodox amalgam of factual assertions and legal argument.[3] Since the court had not yet acted on their motion to withdraw from the *AAVR* case, the Bosley plaintiffs sought to rectify counsel's lapse by seeking leave to file, *pro se*, a memorandum of law and supporting affidavits in opposition to defendants' summary judgment motion (49-51). Judge Hamilton denied the motion without explanation (52).

On June 17, 1992, Judge Hamilton granted defendants' motion for summary judgment on all of the *AAVR* plain-

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[2] Discovery in the *AAVR* case was limited to a single deposition concerning plaintiffs' one-person, one-vote claim (rehearing addendum, 2-178).

[3] According to Judge Hamilton, the Jones affidavit was "largely conclusory . . . containing one legal argument that the use of voting population instead of total population in determining proportionate representation is constitutionally defective based on the holding in *Preisler v. Mayor of City of St. Louis*, 303 F.Supp. 1071 (E.D.Mo. 1969)" (83).

tiffs' claims (75-85) and issued a separate order denying as moot the motion to withdraw submitted by the Bosley plaintiffs' original attorneys, the Bosley plaintiffs' motion to voluntarily withdraw as plaintiffs without prejudice, and the motion for reassignment and consolidation based on relatedness (86).

On June 29, 1992, Mr. Miner substituted as counsel for the *AAVR* plaintiffs and filed a Rule 59(e) motion to alter or amend Judge Hamilton's judgment (89-90). This was Mr. Miner's first appearance in *AAVR*.[4] Judge Hamilton denied the Rule 59(e) motion on November 2, 1992 stating that the "facts and issues now presented could . . . have been produced at an earlier time" (93-96). The Bosley plaintiffs filed a timely notice of appeal (110).

2. *The Miller proceedings in the district court.* On June 6, 1992, while the Bosley plaintiffs' motion to withdraw from the *AAVR* case was still pending before Judge Hamilton, defendants in *Miller* moved to dismiss the *Miller* action on the ground that, *inter alia*, the Bosley plaintiffs were still plaintiffs in the *AAVR* case (53-54). In response, plaintiffs assured Judge Filippine that the five Bosley plaintiffs had no intention of remaining in both lawsuits and that they would withdraw from *Miller* if their motion to withdraw from *AAVR* was denied (55-65). In reply, defendants acknowledged that their motion was moot (98; R. 8).

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[4] Mr. Miner assisted the Bosley plaintiffs in the preparation of their *pro se* memorandum in opposition to defendants' motion for summary judgment and was listed as "of counsel" thereon, but, as already stated, Judge Hamilton denied leave to file these materials. Mr. Miner also prepared the motion for reassignment and consolidation based on relatedness which was filed in the older of the cases sought to be consolidated.

Shortly after the Rule 59(e) motion was denied in the *AAVR* case, the plaintiffs in *Miller* (a) moved for leave to file an amended complaint dropping the Bosley plaintiffs, adding two new plaintiffs (petitioners Clay and Jones), and expanding their factual allegations (97-109); (b) commenced discovery; and (c) moved for class certification (R. 97-108; R. 15).

The *Miller* defendants renewed their motion to dismiss, asserting *res judicata* and *stare decisis* (R. 11). Judge Filippine converted this motion to a motion for summary judgment (111), and on March 2, 1993, ruled in favor of defendants with respect to the issue of *res judicata* (App. B-1). At the outset, Judge Filippine noted that the Bosley plaintiffs had already moved to withdraw from the *Miller* case, and that they did not dispute that they were bound by the *AAVR* decision (App. B-3). He then held that although petitioners Miller, Woodruff, and Carter were not parties to the *AAVR* case, they were nevertheless "in privity" with the *AAVR* plaintiffs under a theory of "virtual representation" based on the facts that (a) petitioners and the *AAVR* plaintiffs have the same interests; and (b) those interests were "adequately represented" by Mr. Miner in the post-judgment Rule 59(e) motion (App. B-3-6). The court denied as moot the motions to amend the complaint and to add petitioners Clay and Jones as plaintiffs (App. B-7).

Petitioners filed a timely notice of appeal (121-24). The Eighth Circuit panel that was then considering the *AAVR* appeal stayed proceedings in the *Miller* appeal pending resolution of the *AAVR* appeal (130).

3. *The appellate history in AAVR.* On August 4, 1993, the panel affirmed without opinion Judge Hamilton's order granting summary judgment for defendants in the

AAVR case. *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 999 F.2d 1301 (8th Cir. 1993). On June 30, 1994, however, the Supreme Court granted a writ of certiorari, *sub nom. Tyus v. Bosley*, 114 S.Ct. 2776 (1994), vacated the panel's judgment and remanded for further consideration in light of *Johnson v. DeGrandy*, 512 U.S. 997 (1994). Almost a year later, on May 12, 1995, the panel issued a new opinion. At the outset, the panel held that the failure of original counsel in *AAVR* to file a memorandum and appropriate documentation in response to the summary judgment motion did not constitute excusable neglect, and that Judge Hamilton's refusal to consider the Bosley plaintiffs' *pro se* memoranda and documents therefore did not constitute an abuse of discretion. *African-American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1350-51 (8th Cir. 1995). The panel then went on to uphold the district court's decision to consider only those facts contained in the affidavits of Dr. Jones and defendants' experts. *Id.*, at 1350-51. Based on this limited record, the panel found that the Jones affidavit did not create a genuine issue of material fact and affirmed the summary judgment in favor of defendants. *Id.*, at 1356-57. Plaintiffs' suggestion for rehearing *en banc* was denied with three judges dissenting. Certiorari was denied. 116 S.Ct. 913 (1995).

C. *The Eighth Circuit's Opinion.*

On September 11, 1995, the panel vacated the stay of proceedings in *Miller* and directed the parties to brief the issues involving the grant of summary judgment (131). On August 16, 1996, the panel affirmed Judge Filippine's dismissal of this lawsuit on *res judicata* grounds, holding

that although petitioners were not parties to the prior *AAVR* lawsuit, they were nevertheless precluded from pursuing their lawsuit under the doctrine of "virtual representation" (App. A-1).

The starting point of the panel's analysis is that *res judicata* obtains only where the party to be precluded was either a party to the first suit or is "in privity" with a party to the first suit (App. A-9). It then goes on to list three categories of nonparties who will be considered "in privity":

> (1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequately represented by a party to the original action.

(App. A-11.) This case, says the panel, involves the third category, adequate representation, also known as "virtual representation" (*ibid.*).

The panel notes that the circuits are "sharply divided" over the scope of virtual representation, with some courts applying the historically accepted doctrine of preclusion based on the "existence of an express or implied legal relationship in which parties to the first suit are accountable to the nonparty in the second suit" (App. A-12-13), while other courts give the doctrine a "wide use" permitting preclusion where the nonparty has a "substantial relationship" to a party in the first suit and "the balance of the relevant equities tips in favor of preclusion" (App. A-12). The panel expressly "agree[s] with those courts that give wider use to virtual representation" (App. A-13).

Applying the doctrine to the petitioners, the panel concluded that they had a "commonality of interests" with,

and that they were therefore "virtually represented" by, the *AAVR* plaintiffs because (a) three of the five petitioners and a majority of the *AAVR* plaintiffs "were elected African-American officials"[5] and "shared the same concern: the dilution of the African-American vote in St. Louis" (App. A-19); and (b) the attorney representing plaintiffs in *Miller* had substituted as counsel in *AAVR* (App. A-18).[6] With respect to due process concerns, the court held (a) that the voting rights claims raised by the petitioners were "issues of public law" for which "the due process concerns attendant with a broad application of preclusion are lessened" (App. A-20); and (b) the petitioners were "adequately represented" in *AAVR* because the *AAVR* plaintiffs had "every incentive and opportunity to fully litigate [their] claims" (*ibid.*). The court explicitly rejected petitioners' argument that due process requires that the prior litigation be "effective[ly] and diligent[ly]" conducted so as to "insure the full and fair consideration

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[5] Petitioner Jones was a St. Louis alderman, as were the five Bosley plaintiffs; petitioner Carter was a state representative, and petitioner Clay was a state senator. In their memorandum opposing the petition for rehearing *en banc*, respondents asserted, for the first time, that petitioner Miller and Alderwoman Tyus, one of the Bosley plaintiffs, had been married in 1988.

[6] The panel opinion incorrectly states that Mr. Miner was "substituted as counsel in [*AAVR*] on April 24, 1992, well before the City's summary judgment motion was granted" (App. A-18-19). Original counsel did not move to withdraw until June 8, 1992 (*AAVR* 129) (which motion was denied as moot), and Mr. Miner did not substitute as counsel until June 29, 1992, at which time he filed the Rule 59(e) post-judgment motion (*see supra* at 5). Mr. Miner had no involvement whatsoever in the conduct or strategy of the *AAVR* litigation prior to the Rule 59(e) post-judgment motion other than what is discussed above (*see supra* at 5 n.4).

of the common issues" (*ibid.*). Finally, the panel held that preclusion was particularly appropriate because the Bosley plaintiffs had engaged in "tactical maneuvering" to "circumvent trial strategy disagreements" with original counsel by attempting to withdraw from the *AAVR* lawsuit to join the *Miller* lawsuit (App. A-19).

Concurring in the result, Senior Judge Henley expressed "concern about how far we should go in extending preclusive effect to cases of so-called 'virtual representation' " (App. A-22). According to Judge Henley:

> It is one thing to hold that a party in privity under principles of contract or property law should be bound by the results of prior litigation. It is quite another matter, however, to say that strangers to the prior litigation should be bound solely because they would raise the same issue or favor the same legal position.

(*Ibid.*) Judge Henley specifically took issue with the panel opinion's failure to address the issue of "notice" and with its holding that "adequate representation" requires nothing more than "that plaintiffs in the first suit had the 'incentive' to raise the same issues the parties in the second suit would raise" (App. A-23). Judge Henley also expressed concern that the first suit was not a class action and was disposed of on a motion for summary judgment based on a truncated record without discovery and without a brief in opposition (App. A-24). Nevertheless, the Judge concurred in the result on the ground that the requirements of "notice" and "sufficient representation" were satisfied as to petitioners because the two actions had, at some point, shared some of the same plaintiffs and the same counsel (App. A-23-24).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons:

First, as the panel opinion acknowledges, there is a split in the circuits as to the constitutionality and scope of virtual representation as a standard for nonparty preclusion. In an unprecedented application of *res judicata* to a nonparty, the Eighth Circuit has deviated from the majority view among the circuits and aligned itself with the Eleventh Circuit.

Second, the broad standard for nonparty preclusion adopted by the Eighth Circuit cannot be reconciled with the fundamental principal that everyone is entitled to his day in court, and effectively creates a class judgment where there has been no class certification or any of the due process protections afforded potential or actual class members. Moreover, if "virtual representation" is constitutionally adequate representation as the Eighth Circuit holds, then this case presents the issues left undecided last term in *Richards v. Jefferson County, Ala.*, ___ U.S. ___, 116 S.Ct. 1761, 1766-67 (1996), namely, whether adequate representation can excuse a lack of notice and, if not, what kind of notice is required.

ARGUMENT

A. The virtual representation theory adopted by the panel is in conflict with other circuit court opinions.

The cornerstone of the panel's opinion is its adoption of an expansive theory of "virtual representation." According to the panel, "virtual representation" is "preclusion based on adequate representation," and "was given its clearest statement" in the Fifth Circuit case of *Aerojet-*

General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) ("a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative") (App. A-10). In fact, however, the Fifth Circuit promptly recognized that without clear limiting principles, the "virtual representation" theory held the potential of running roughshod over the due process rights of nonparties. *See Southwest Airlines Co. v. Texas Intern. Airlines, Inc.*, 546 F.2d 84, 97, and n. 50 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) (noting the "inconsistent application" and "confusion surrounding" the doctrine of virtual representation). As a consequence, the Fifth Circuit, in *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978), abandoned the broadly-stated theory in *Aerojet-General* and substituted the rule that:

> Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.

Pollard, 578 F.2d at 1008.[7]

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[7] According to *Pollard*, the types of legally accountable relationships sufficient to bind a non-party under a theory of virtual representation include (a) estate beneficiaries bound by administrators; (b) presidents and sole stockholders bound by their companies; (c) parent corporations bound by their subsidiaries; (d) a trust beneficiary bound by the trustee; and (e) in some contexts, a private interest bound by a governmental authority, where "a governmental authority [serves] as public enforcer of an ordinance and private parties [are] suing for enforcement as private attorney generals." *Id.*, at 1008-09. These closely mirror the list of relationships set out in the Restatement (Second) of Judgments, §41 (1981), which eschews the use of the term "virtual representation" altogether.

If such an express or implied relationship of legal accountability is lacking, *res judicata* cannot bar the claims of nonparties, even where—as was the case in *Pollard*—a nonparty is represented by the same attorney and the complaints and issues raised are essentially identical:

> In the instant case . . . the [plaintiffs in the first suit] were in no sense legally accountable to the [parties in the second suit]; they shared only an abstract interest in enjoining enforcement of the ordinance. The [parties to the first suit] sued in their individual capacities and not as representatives of a judicially certified class. Representation by the same attorneys cannot furnish the requisite alignment of interests in light of the well established rule that, in areas affecting the merits of the cause or substantially affecting the rights of the client "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

Id., at 1009, *quoting* American Bar Association, *Code of Professional Responsibility*, EC 7-7 (1971).

Subsequent Fifth Circuit cases have closely followed *Pollard*'s formulation of virtual representation so as to keep the doctrine within "strict confines." *See, e.g., Meza v. General Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990) (consent, contractual duty or statutory obligation necessary for a finding of virtual representation); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (no express or implied relationship where party to the second suit has participated as a witness in the first suit, has met repeatedly with the party in the first suit, and shares the same attorney and the same claim from the same set of facts); *Freeman v. Lester*

Coggins Trucking, Inc., 771 F.2d 860, 865 (5th Cir. 1985) (husband-father who lost negligence suit is not a virtual representative of other family members).

With the exception of the Eleventh Circuit,[8] every circuit court that has considered the issue has rejected, limited or criticized the broad formulation of virtual representation set forth in *Aerojet-General* and adopted by the Eighth Circuit in this case. *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 760 (1st Cir. 1994); *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1125 (7th Cir. 1987); *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1411, n. 8 (D.C. Cir. 1985); *United States v. Geophysical Corp. of Alaska*, 732 F.2d

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[8] The Eighth Circuit cites to the Eleventh Circuit's opinion in *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), as the authority for "a wide use of virtual representation, inquiring whether there exists a substantial relationship between the party and nonparty, such that the party adequately represented the interests of the nonparty" (App. A-12). In the end, however, the panel relies principally on the district court opinion in *Petit v. City of Chicago*, 766 F.Supp. 607 (N.D.Ill. 1991). Petitioners do not believe that *Petit* meets the due process requirements articulated by this Court, *infra* at 15-19, or that it articulates the views of the Seventh Circuit, which has expressed serious doubts about the constitutionality of virtual representation, *see, e.g. Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1125 (7th Cir. 1987); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692-94 (7th Cir. 1986) (*en banc*); *see also Vas-Cath Inc. v. Mahurkar*, 745 F.Supp. 517, 531-32 (N.D.Ill. 1990) (Easterbrook, J., sitting by designation). More important, while *Petit* applies the doctrine of "virtual representation," the court recognized that a prior judgment could not be binding on nonparties unless their interests had been "adequately and vigorously represented" in the prior litigation and expressly stated that there was no dispute over the adequacy of representation in the prior lawsuit. 766 F.Supp. at 611-12.

693, 697 (9th Cir. 1984). *See also Phillips v. Kidder, Peabody & Co.*, 750 F.Supp. 603, 607-08, and n. 2 (S.D.N.Y. 1990) (noting that Second Circuit's requirement that a party be "vested with the authority of representation" to bind a nonparty corresponds to the *Pollard* formulation).

B. The standard for nonparty preclusion adopted by the Eighth Circuit violates due process.

The general rule is that *res judicata* only bars relitigation of claims by persons who were parties to the original litigation. *Richards v. Jefferson County, Ala.*, 116 S.Ct. 1761, 1766 (1996); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *Hansberry v. Lee*, 311 U.S. 32 (1940).[9] Last term, this Court reaffirmed that there are two exceptions to the general rule. One is the long-standing "exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards*, 116 S.Ct. at 1766. The second "exception to the general rule is when, *in certain limited circumstances*, a person . . . has his interests adequately represented by someone with the same interests who is a party." *Ibid.*, *quoting Wilks*, 490 U.S. at 762 n. 2 (emphasis added).

With respect to the first exception, the Court noted that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term" and cites

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[9] The preclusive effect of a federal court judgment on a subsequent federal court case is determined by federal common law. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324, n. 12 (1971).

to the Restatement (Second) of Judgments, ch. 4 (1980). *Ibid.* It is undisputed that petitioners are not in privity with the *AAVR* plaintiffs under either the traditional definition of privity or under the discussion contained in the referenced sections of the Restatement of Judgments because there is no actual or implied relationship by which the *AAVR* plaintiffs are legally accountable to petitioners.

With respect to the "adequate representation" exception, due process requires that

> a prior proceeding, to have binding effect on absent parties, would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that *the litigation is so conducted as to insure the full and fair consideration of the common issue.*"

Richards, 116 S.Ct. at 1767 (*quoting Hansberry v. Lee*, 311 U.S. 32, 43 (1940)) (emphasis added). Here, this requirement is not met.[10] Original counsel for the *AAVR* plaintiffs not only failed to file a brief in opposition to defendants' summary judgment motion, but also failed to introduce highly relevant affidavits and documents, failures that the Eighth Circuit held in the *AAVR* appeal did not constitute excusable neglect. 54 F.3d at 1350. In addition, due process requires that the absent parties must be given "notice that a suit was pending which would conclusively resolve their legal rights." *Richards*, 116 S.Ct. at 1767. No such notice was given here.

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[10] The party asserting a defense of *res judicata* shoulders the burden of *proving* adequate representation; it must be "clearly shown and cannot rest upon mere assertion or speculation." *Bryson v. Guarantee Reserve Life Ins. Co.*, 520 F.2d 563, 567 (8th Cir. 1975).

The panel opinion circumvents the due process limitations on *res judicata*[11] by collapsing the "adequate representation" exception into the "privity" exception. "Virtual representation," the panel says, is another name for "adequate representation," which, in turn, is a category of "privity," and *res judicata* applies to parties and their privies. In this context, the panel finds that "adequate representation" is not a due process requirement, but merely one factor to be considered among many, and further, that it means only that the parties to the first suit had "an incentive" to litigate, not that the first proceeding was "so conducted as to insure the full and fair consideration of the common issue." The issue of notice is simply ignored.

Judge Henley, in his concurring opinion, recognizes that both "notice" and "sufficient representation" are constitutional prerequisites, but concludes that both are satisfied because some of the plaintiffs in *Miller* had been plaintiffs in *AAVR* and Mr. Miner represented

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[11] The panel cites *Richards* for the proposition that "due process concerns are lessened" in this voting rights case because it involves "a public law issue" rather than a "private law" issue (App. A-20). The rights asserted in this case by the Miller plaintiffs clearly fall into the latter, and not the former, category of cases, a fact recognized by this Court in *Richards*, 116 S.Ct. at 1767 n. 6, and reiterated more recently in *Shaw v. Hunt*, 116 S.Ct. 1894, 1906 (1996). *See also*, *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). While the Miller plaintiffs' vote dilution claims may involve issues of great public import, and the St. Louis map may impinge on the rights of an entire class of African-American voters, each individual plaintiff's interest in an undiluted vote is no less personal than the taxpayer's interest in not paying an unconstitutional tax. Under *Richards*, the due process considerations afforded such an individual are not diminished one whit.

plaintiffs, at some point, in both actions. This view, however, cannot be reconciled with the settled rule that mere awareness of a lawsuit is not enough because intervention is not compulsory. *Wilks*, 490 U.S. at 763. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.*, at 765. As Judge Easterbrook of the Seventh Circuit has explained:

> Notwithstanding the attractions of the [virtual representation] doctrine, the idea that someone may be bound by the results of a case even though he did not participate is in tension with the autonomy recognized in our legal system. It amounts to saying that intervention is compulsory, that if a pending case affects your interests you *must* intervene in it, because you will be bound whether you intervene or not—at least if someone already there is "on your side" (that is, offers "virtual representation"). Yet the rules of intervention under Fed.R.Civ.P. 24 run the opposite way: if a party in the case represents your interests, the court is unlikely to allow intervention.
>
> . . .
>
> All of this is in sharp conflict with the principles that an entity is not bound by the decision of a case in which it could not participate, and that no one is obliged to intervene. The onus, rather, is on the adverse party to join anyone it would like to have bound. If "virtual representation" is enough to bind a party, then *Martin v. Wilks*, 490 U.S. 755 (1989), should have come out the other way. . . .
>
> Class actions do not offend accepted principles in the same way "virtual representation" does. A member of a class . . . may opt out. . . . A member of the class who opts out may litigate independently, and is not

> bound by an adverse judgment in the main action—and correspondingly may not take the benefit of a favorable one, "virtual representation" by the class representative notwithstanding.

Vas-Cath Inc. v. Mahurkar, 745 F.Supp 517, 531-32 (N.D.Ill. 1990) (Easterbrook, J., sitting by designation).

The result under either the panel opinion or the concurring opinion turns the law on its head. If the *AAVR* lawsuit had been certified as a class action, petitioners would have received formal notice that an action was pending which would conclusively determine their rights and an opportunity to opt out to pursue their own lawsuit. Moreover, even if they had not opted out, they would not have been bound by the judgment because the *AAVR* plaintiffs failed to prosecute their case "with due diligence and reasonable prudence." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1278, *cert. denied*, 506 U.S. 953 (1992) (quoting Restatement (Second) of Judgments, §42(e)); *see also Clark v. Amoco Production Co.*, 794 F.2d 967, 974 (5th Cir. 1986); *Ferguson v. Winn Parish Police Jury*, 589 F.2d 173, 176 n.6 (5th Cir. 1979); *Roman v. ESB, Inc.*, 550 F.2d 1343, 1356 (4th Cir. 1976) (*en banc*). Yet here, where no class was certified, the Eighth Circuit holds that petitioners were not entitled to notice, could not opt out, and are bound by the judgment in a lawsuit over which they had no control and in which the plaintiffs' claims were not prosecuted with due diligence and reasonable prudence. This result is particularly ironic because petitioners sought, but defendants in fact *opposed*, consolidation of the two cases.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDICES

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APPENDIX A

Sharon TYUS, Plaintiff,

Sterling S. Miller, Appellant,

Irving Clay, Jr.; Bertha Mitchell, Plaintiffs,

Clarence Woodruff, Appellant,

Claude Taylor, Plaintiff,

Paula J. Carter, Appellant,

Freeman Bosley, Sr., Plaintiff,

William L. Clay, Jr.; Kenneth Jones, Appellants,

v.

Vincent C. SCHOEMEHL; Thomas A. Villa; Board of Aldermen, of the City of St. Louis; Board of Election Commissioners, of St. Louis City; City of St. Louis, a municipal corporation, Appellees.

No. 93-1811.

United States Court of Appeals,
Eighth Circuit.

Submitted April 9, 1996.

Decided Aug. 16, 1996.

Rehearing and Suggestion for Rehearing
En Banc Denied Oct. 28, 1996.

***450** Judson H. Miner, Chicago, IL, argued, for appellants.

Edward James Hanlon, St. Louis, MO, argued (Tyrone A. Taborn, City Counselor, on the brief), for appellees.

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

At issue in this § 2 Voting Rights Act case is whether issue preclusion bars certain plaintiffs-appellants[1] from bringing a second suit challenging the St. Louis aldermanic district boundaries, which are drawn based on the 1990 federal decennial census. Although these appellants were not parties to the original lawsuit challenging the aldermanic boundaries, *see African American Voting Rights Legal Defense Fund v. Villa*, 54 F.3d 1345 (8th Cir.1995) (the Aldermen-*AAVR* suit), *cert. denied*, ___ U.S. ___, 116 S.Ct. 913, 133 L.Ed.2d 844 (1996), they were "virtually represented" by those plaintiffs to the Aldermen-*AAVR* suit, and therefore issue preclusion does apply. The district court[2] held that claim preclusion, rather than issue preclusion, applies, so we affirm on alternate grounds.

*451 I.

The city of St. Louis is governed by a Board of Aldermen consisting of twenty-eight aldermen elected from

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[1] Plaintiffs in this suit included Sharon Tyus, Irving Clay, Jr., Bertha Mitchell, Claude Taylor, Freeman Bosley, Sr., Sterling Miller, Clarence Woodruff, and Paula Carter. In addition, William Clay, Jr. and Kenneth Jones sought to intervene, but their motion was denied as moot. Only Miller, Woodruff, Carter, Clay, Jr., and Jones have appealed the district court's decision.

[2] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

twenty-eight single-member wards. In 1991, St. Louis began to redraw the aldermanic boundaries in accordance with the 1990 census. Although the census revealed that African-Americans comprised a majority in thirteen of the twenty-eight wards, and were a plurality in one additional ward, the majority of aldermen voted to adopt an aldermanic map that provided for sixteen wards in which whites have a voting age majority and twelve wards in which African-Americans have a voting age majority.

A. *AAVR* Lawsuit

On January 16, 1992, a group of African-Americans filed the *AAVR* lawsuit, challenging the validity of the new ward boundaries. *See African American Voting Rights Legal Defense Fund v. Villa*, No. 4:92 CV 00044 (E.D.Mo.1992). Among the named plaintiffs were five African-American St. Louis aldermen—Freeman Bosley, Sr., Sharon Tyus, Bertha Mitchell, Claude Taylor, and Irving Clay, Jr. (the Aldermen plaintiffs)—and the African American Voting Rights Legal Defense Fund. Initially, several different counsel represented the plaintiffs. Eventually, these attorneys were replaced with attorney Judson Miner.

In this suit, plaintiffs contended that (1) the boundary lines were drawn in such a way as to fragment concentrations of black population, diluting black voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C.A. § 1973 (West 1994 & Supp.1996), and the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution; (2) the boundary lines were drawn in such a way as to pack concentrations of

black population into specific wards, diluting overall black voting strength in violation of the above provisions; and (3) the ward boundaries violate the Fourteenth Amendment, because they have populations with a variance in excess of ten percent.

On February 19, 1992, defendants in the Aldermen-*AAVR* suit (collectively, the City) moved for summary judgment, contending that the map had been drawn in such a way as to provide substantial proportionality. Four affidavits supporting this claim, including a statistical analysis performed by Donald L. Davidson, the City's expert, were attached. On April 27, 1992, counsel for plaintiffs opposed this motion with an affidavit from expert witness Dr. Charlene Jones. The affidavit discussed the appropriate means of measuring proportional representation and other issues surrounding both the dilution claim and the Fourteenth Amendment claim.

Meanwhile, a dispute over trial strategy had arisen between the Aldermen plaintiffs and original counsel. On April 24, 1992, the Aldermen plaintiffs hired their current attorney, Judson Miner (although, for reasons unexplained by the parties, original counsel continued to file papers, such as the Jones affidavit, on behalf of the plaintiffs for another month). On May 5, the Aldermen plaintiffs moved to voluntarily withdraw from the Aldermen-*AAVR* suit and have their claims dismissed without prejudice.

After having sought leave to withdraw from the Aldermen-*AAVR* suit, the Aldermen plaintiffs learned that the original counsel had responded to the City's summary judgment motion with only the Jones affidavit. On May 26, 1992, dissatisfied with this submission, the Aldermen

plaintiffs sought leave to file out of time a twelve-page memorandum of law and two supporting affidavits in an attempt to bolster the Jones affidavit. This motion, made more than three months after the City's summary judgment motion, was denied by the district court without explanation.

B. *Miller* Lawsuit

On April 27, 1992, with the City's summary judgment motion pending in the Aldermen-*AAVR* suit, the Aldermen plaintiffs filed a second lawsuit against the City challenging the St. Louis map. *See Sharon Tyus, et al. v. Schoemehl*, No. 4:92 CV 0000801 (E.D. Mo.1992) (the *Miller* suit). In this suit, the plaintiffs raised the same claims as those raised in the Aldermen-*AAVR* suit: (1) the boundary lines as drawn fragment the black ***452** population, diluting black voting strength in violation of § 2 of the Voting Rights Act; and (2) the map was drawn with the discriminatory purpose of diluting black voting strength, in violation of the Fourteenth and Fifteenth Amendments and 42 U.S.C. § 1983. At this time, attorney Miner represented the plaintiffs in both suits. The Aldermen plaintiffs were joined in the *Miller* suit by Sterling Miller, Clarence Woodruff, and Paula Carter (an African-American Missouri state representative).

C. Subsequent Orders in the Two Suits

On June 17, 1992, the district court in the Aldermen-*AAVR* suit granted the City's motion for summary judgment. The court determined both that expert Jones's memorandum failed to refute the City's assertion that

the 1991 ward map provides African-American voters with proportional representation and that the Jones memorandum raised no triable issue with respect to the one person-one vote claim. Second, the court denied as moot the Aldermen plaintiffs' motion to withdraw from the Aldermen-*AAVR* suit.

Meanwhile, on June 6, 1992, the City moved to dismiss the *Miller* suit on the grounds that the Aldermen-*AAVR* suit was still pending before the district court and the Aldermen plaintiffs were plaintiffs in both suits. On June 20, the City renewed this motion, contending now that, given the grant of summary judgment to the City in the Aldermen-*AAVR* suit, the *Miller* suit was barred by res judicata and stare decisis.

On June 29, 1992, in the Aldermen-*AAVR* suit, the Aldermen plaintiffs, as well as the African American Voting Rights Legal Defense Fund, filed a Rule 59(e) motion to alter or amend the June 17 summary judgment and mootness orders. The parties in the *Miller* suit agreed to stay briefing in that suit until the Rule 59(e) motion in the Aldermen-*AAVR* suit was ruled upon. The Rule 59(e) motion was denied on November 2, 1992. Upon the denial of the Rule 59(e) motion, the plaintiffs in the *Miller* suit moved for leave to file an amended complaint, dropping the Aldermen plaintiffs from the suit; adding two new plaintiffs, William L. Clay, Jr., an African-American Missouri state senator, and Kenneth Jones, an African-American St. Louis alderman; and expanding their factual allegations.

The district court converted the City's June 20 motion to dismiss the *Miller* suit into a summary judgment motion, and on March 2, 1993, the court granted this

motion on claim preclusion grounds. The court first noted that the Aldermen plaintiffs, who were never allowed to withdraw from the Aldermen-*AAVR* suit, were clearly barred from raising their claims by claim preclusion. Further, although plaintiffs Miller, Woodruff, and Carter were not parties to the Aldermen-*AAVR* suit, they were nevertheless in privity with the plaintiffs in the Aldermen-*AAVR* suit under a theory of "virtual representation." According to the district court, these plaintiffs had been adequately represented by the plaintiffs in the Aldermen-*AAVR* suit and thus were bound by the ruling in that suit. Mem. & Order at 4 (Mar. 2, 1993). The court further denied as moot the motion to amend the complaint and add Jones and Clay, Jr. as plaintiffs. *Id.* at 8.

Miller, Woodruff, and Carter, as well as Jones, Jr. and Clay (the Miller plaintiffs), appealed the March 2, 1993 ruling. They sought to have the appeal consolidated with the *AAVR* appeal that was then currently pending before this Court. The consolidation motion was denied and this Court stayed proceedings in the *Miller* suit pending resolution of the *AAVR* appeal.

This Court summarily affirmed the granting of the summary judgment motion in the Aldermen-*AAVR* suit, *see African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 999 F.2d 1301 (8th Cir.1993). The Supreme Court vacated this decision and remanded for reconsideration of other issues not pertinent here in light of *Johnson v. DeGrandy*, ___ U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). *See Tyus v. Bosley*, ___ U.S. ___, 114 S.Ct. 2776, 129 L.Ed.2d 888 (1994). Upon remand, this Court again upheld the grant of summary judgment to the City. *See African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345 (8th Cir.1995),

cert. denied, ___ U.S. ___, 116 S.Ct. 913, 133 L.Ed.2d 844 (1996). Following this decision, this Court vacated ***453** the stay of proceedings in the *Miller* suit and directed the parties to brief the issues involving the grant of summary judgment in this case.[3]

II.

A.

Both suits raise identical dilution claims. Each contends the map boundaries violate § 2 of the Voting Rights Act by fragmenting black voters, thereby diluting black voting strength. Each also contends that the dilution of black voting strength violates the Fourteenth and Fifteenth Amendments.[4] At issue, then, is whether the *Miller* suit is barred by issue preclusion[5] because the

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[3] We grant the appellants' motion to supplement the record to include the decision in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

[4] The *Miller* suit also contends that the vote dilution violates 42 U.S.C. § 1983. In substance, however, this is not a separate claim. Rather, it is subsumed under the Voting Rights Act and Fourteenth and Fifteenth Amendment claims; this claim appears to us to be no more than "a cosmetic change" in pleading designed to "perpetuate litigation on the same basic issues." *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir.1996).

[5] Regarding the interplay between issue preclusion and claim preclusion, the Supreme Court has noted:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclu-

(continued...)

claims raised in that suit were litigated and necessarily decided by the Aldermen-*AAVR* suit. We hold that it is.[6]

Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, "the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982); *see also Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir.1996). Issue preclusion will also bar relitigation of an issue by one who, although not a party to the original suit, is in privity with a party to that suit. *See Oldham v. Pritchett*, 599 F.2d 274, 276 n. 1 (8th Cir.1979).

In addition to the requirement that the party in the second suit sought to be precluded was a party, or in

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[5] (...continued)

> sion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984) (citations omitted).

[6] Although the district court applied claim preclusion when granting the City's motion for summary judgment, we believe that issue preclusion is the appropriate preclusion doctrine in this case. We nevertheless may affirm the district court, for "we may affirm the district court's grant of summary judgment on any ground supported by record." *White v. Moulder*, 30 F.3d 80, 82 (8th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 738, 130 L.Ed.2d 641 (1995).

privity with a party, to the original lawsuit, *see id.*, there are four other prerequisites to the application of issue preclusion: (1) the issue sought to be precluded must be the same as that involved in a prior action; (2) the issue must have been actually litigated in the prior action; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment. *See Farmland Indus. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (8th Cir.1993). The parties do not contest that the last four requirements for preclusion are met in this case. The sole issue, therefore, is whether the Miller plaintiffs are in privity with the Aldermen plaintiffs, so that the Miller plaintiffs should be bound by the result in the Aldermen-*AAVR* suit.

B.

Preclusion is rooted in concerns of judicial economy. As we have noted, "[i]n this era of overcrowded dockets the courts have a positive duty to restrict needless relitigation of issues." *Gerrard v. Larsen*, 517 F.2d 1127, ***454** 1134 (8th Cir.1975); *see also Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) (preclusion doctrines "conserve[ ] judicial resources"). Additionally, the preclusion doctrines protect defendants, by relieving them of "the expense and vexation attending multiple lawsuits." *United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir.1994) (quoting *Montana*, 440 U.S. at 153, 99 S.Ct. at 973), *cert. denied*, ___ U.S. ___, 116 S.Ct. 73, 133 L.Ed.2d 33 (1995).

However, due process concerns are present when the party sought to be precluded was not an actual party in

the first lawsuit. Because preclusion based on privity is an exception to the "deep-rooted historic tradition that everyone should have his own day in court," *Richards v. Jefferson County, Ala.*, ___ U.S. ___, ___, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996) (citation omitted), courts must ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion. Thus, "the due process clauses prevent preclusion when the relationship between the party and non-party becomes too attenuated." *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977).

There are three generally recognized categories of nonparties who will be considered in privity with a party to the prior action and who will be bound by a prior adjudication: (1) a nonparty who controls the original action; (2) a successor-in-interest to a prior party; and (3) a nonparty whose interests were adequately represented by a party to the original action. *See generally* 18 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction §§ 4451, 4454-57, and 4462 (1981 & Supp.1990). This case focuses on the third category.

Preclusion based on adequate representation, otherwise known as "virtual representation," was given its clearest statement in *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). In that case, the court noted that

> [u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Id. at 719. Although this principle is generally accepted, courts are sharply divided on how to implement this strand of issue preclusion.

Some courts permit a wide use of virtual representation, inquiring whether there exists a substantial relationship between the party and nonparty, such that the party adequately represented the interests of the nonparty. *See, e.g., NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). Because of the fact-intensive nature of these inquiries, there is no clear test that can be employed to determine if virtual representation is appropriate. It is evident, however, that because virtual representation rests on the notion that it is fair to deprive a nonparty of his day in court, "virtual representation has a pronounced equitable dimension." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir.1994). A nonparty will be barred from bringing his claim only when "the balance of the relevant equities tips in favor of preclusion." *Id.*

Other courts would permit a nonparty to be bound by a prior judgment under a theory of virtual representation only in very limited, technical situations. For example, in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir.1978), the court noted that "[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to nonparties who file a subsequent suit raising identical issues." *Id.* at 1008; *see also Klugh v. United States*, 818 F.2d 294, 300 (4th Cir.1987) (same). Examples of such a relationship would be " 'estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee.' " *Pollard*, 578 F.2d at 1008-09 (quoting *Southwest Airlines Co.*, 546 F.2d at 97).

Under this view, virtual representation is little more than the doctrine of preclusion based on representation that has historically been accepted by courts.

***455** We agree with those courts that give wider use to virtual representation. This liberal use better accommodates the competing considerations of judicial economy and due process. Although we are cognizant of the concerns underlying the *Pollard* decision—that broad use of this doctrine will completely eviscerate the notion that a party is entitled to his day in court—we believe that these concerns are better addressed through a careful application of the doctrine to the facts in a given case than by artificially limiting the scope of the doctrine.

This conclusion is not altered by the recent Supreme Court decision in *Richards, supra*. In *Richards*, the Court permitted a group of taxpayers to challenge a municipal tax as an unconstitutional deprivation of property, even though an earlier group of taxpayers had already litigated this issue and lost. The Court began by reaffirming the general rule that " 'one is not bound by a judgment in personam in a litigation in which he is not designated as a party. . . .' " *Richards*, ___ U.S. at ___ - ___, 116 S.Ct. at 1765-66 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940)). Because the two sets of plaintiffs were "mere 'strangers' to one another," *id.* at ___, 116 S.Ct. at 1768, the Court concluded that the plaintiffs to the earlier suit did not provide "representation sufficient to make up for the fact that [the second set of plaintiffs] neither participated in, nor had the opportunity to participate in, the [earlier] action." *Id.* (citations omitted).

However, the Court did note one important exception to the general rule: a party to the second case will be

bound by the result of an earlier case to which it was not a party "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Id.* at ___, 116 S.Ct. at 1766. Although the Court provided some examples of what could constitute privity, it did not offer a general definition of that term. Rather, the Court acknowledged that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Id.*

Virtual representation falls squarely within this exception. A court will apply virtual representation only when it finds the existence of some special relationship between the parties justifying preclusion. In essence, this is a finding that the two parties are in privity. *See Gerrard*, 517 F.2d at 1134 ("Privity . . . is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.") (quoting *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950)). When, as in *Richards*, the two parties are strangers to each other, then virtual representation would not be appropriate. However, where there is a special relationship between the parties, determined after analyzing the factors listed below, then the parties are in privity, and Richards is simply inapposite.

C.

Due to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine. There are, how-

ever, several guiding principles. First, identity of interests between the two parties is necessary, though not alone sufficient. *See Mann v. City of Albany, Ga.*, 883 F.2d 999, 1003 (11th Cir.1989). Other factors to be considered "include a close relationship between the prior and present parties; participation in the prior litigation; apparent acquiescence; and whether the present party deliberately maneuvered to avoid the effects of the first action." *Petit v. City of Chicago*, 766 F.Supp. 607, 612 (N.D.Ill.1991) (citing 18 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 4457).

Another factor to consider is adequacy of representation, *Gonzalez*, 27 F.3d at 762, which is best viewed in terms of incentive to litigate.[7] That is, one party "ade-

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[7] In concluding that adequacy of representation refers to incentive to litigate rather than to actual trial strategy and possible trial errors, as some commentators have argued, *see, e.g.*, 18 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 4457, we are influenced by two observations. First, in applying virtual representation, courts must perform a preliminary relationship inquiry: whether one party's interests are so aligned with those of another that one party can be considered a proxy for the other party. While incentive to litigate may have some bearing on whether the two parties' interests are aligned, considerations of trial strategy and possible trial errors, because they have little bearing on the relationship between the parties, are external to this inquiry.

Second, we note that "in civil litigation, the sins of the lawyer routinely are visited upon the client." *Gonzalez*, 27 F.3d at 762 n. 12. As such,

> [w]e do not understand why a nonparty who comes within the doctrinal framework for virtual representation—a framework in which party and nonparty share identical interests, and that provides for notice and a weighing of

(continued...)

quately ***456** represents" the interests of another when the interests of the two parties are very closely aligned and the first party had a strong incentive to protect the interests of the second party.

Finally, the nature of the issue raised—whether a public law issue or private law issue—is important. Although virtual representation may be used in the private law context, its use is particularly appropriate for public law issues. As the Supreme Court recently noted, when a case challenges a "public action that has only an indirect impact on [a party's] interests," *Richards*, ___ U.S. at ___, 116 S.Ct. at 1768, due process concerns are lessened. In this situation, courts have "wide latitude to establish procedures . . . to limit the number of judicial proceedings. . . ." *Id.*

Further, we note that in public law cases, the number of plaintiffs with standing is potentially limitless. If parties were allowed to continually raise issues already decided, public law claims "would assume immortality." *Los Angeles Branch NAACP v. Los Angeles Unified Sch.*

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[7] (...continued)

> equitable considerations—should be treated differently from a party in this regard.

Id. If party A is a proxy for party B, then we should hold party B to the same standards as we would hold party A. To not apply virtual representation when counsel is deficient would encourage fence-sitting: the nonparty will benefit if the party plaintiff wins, but if the party plaintiff loses due to counsel's deficient performance, the nonparty could refile suit, thereby tactically maneuvering around counsel's deficient performance. Thus, applying preclusion in this situation not only reinforces the goal of judicial economy, but it also prevents an end-run around the rule that parties are responsible for the acts of their counsel.

Dist., 750 F.2d 731, 741 (9th Cir.1984) (applying virtual representation to preclude plaintiff from raising school desegregation claim), *cert. denied*, 474 U.S. 919, 106 S.Ct. 247, 88 L.Ed.2d 256 (1985). Concerns of judicial economy and cost to defendants, while present in every suit, are particularly important in this context. There is another important consideration: in the public law context, if the plaintiff wins, by definition everyone benefits. Holding preclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost.

D.

We conclude that issue preclusion based on virtual representation is appropriate in this case. In reaching this conclusion, we are persuaded by the reasoning of *Petit, supra*. In *Petit*, the city of Chicago, in response to a suit brought by the United States Department of Justice alleging discrimination in hiring and promoting blacks, Hispanics, and women within the Chicago Police Department, developed a new sergeant's exam, consisting of a written test, oral examination, and performance evaluation. *See Petit*, 766 F.Supp. at 609. Many white applicants for sergeant sought to intervene in the continuing suit, alleging that the city manipulated the test scores in favor of minority applicants. Intervention was permitted, and subsequently many of the intervenors' claims were dismissed with prejudice. *Id.* at 610.

Having failed to obtain redress, many of the intervenors, along with additional white police officers, filed the action in *Petit*, raising the same claims previously dis-

missed. The court held that res judicata barred all claims, including those of plaintiffs who had not intervened in the earlier suit. *Id.* at 612-13.

In applying the virtual representation doctrine, the court relied on several factors. The court first mentioned that the claims ***457** raised in the two suits were identical, and that the same counsel argued both cases. More significantly, the court took notice of the tactical maneuvering taking place:

> The intervenors cannot avoid an express federal court order that dismissed their claims *with prejudice* by adding the non-intervenors and refiling this claim. A finding of privity comports with the policy behind *res judicata*. If the intervenors succeeded originally, all of the white police officers would have benefitted—even the non-intervenors. On the other hand, if the intervenors lost, which they did, the non-intervenors cannot obtain a second determination by bringing this separate action. Such an action would encourage "fence-sitting" and discourage the principles and policies the doctrine of *res judicata* was designed to promote.

Id. at 613. Given the close alignment of interests between the first suit intervenors and nonintervenors, and the tactical maneuvering taking place, the district court held that the nonintervenors had already taken their bite at the litigative apple.

The facts in the present case are similar to those in *Petit*. First, both the Aldermen-*AAVR* suit and the *Miller* suit raise similar claims, and there was an overlap in plaintiffs between the two suits. Further, attorney Miner was plaintiffs' counsel in the *Miller* suit, and he was substituted as counsel in the Aldermen-*AAVR* suit on

April 24, 1992, well before the City's summary judgment motion was granted. These factors suggest, at least partly, that a close relationship exists between the prior and present parties. *See id.* at 612.

We further note that plaintiff Carter, potential plaintiffs Clay Jr. and Jones, and all of the Aldermen plaintiffs were elected African-American officials. They all shared the same concern: the dilution of the African-American vote in St. Louis. This organizational commonality suggests a special commonality of interests. *See Hunt*, 891 F.2d at 1561 (where plaintiff in first suit and plaintiffs in second suit were state legislators and members of the NAACP, this was factor demonstrating commonality of interest).

More importantly, as in Petit, there is tactical maneuvering taking place in *Miller*. In an effort to circumvent trial strategy disagreements, the Aldermen plaintiffs filed the *Miller* suit, simply adding new plaintiffs. This second lawsuit directly contravenes the policies supporting the preclusion doctrines. A victory by the Aldermen plaintiffs in the Aldermen-*AAVR* suit would have directly benefited the Miller plaintiffs. On the other hand, without virtual representation, a loss by the Aldermen plaintiffs would cause no harm to the Miller plaintiffs. In such a situation, there is no incentive to intervene. Quite the contrary: holding preclusion inapplicable assures that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group. This entails a significant cost to the judicial system and "discourage[s] the principles and polices the doctrine of res judicata was designed to promote." *Id.* at 613.

Finally, that the *Miller* case raises an issue of public law is another factor in favor of preclusion. The Miller plaintiffs do not allege that they have been denied the individual right to vote. Rather, they allege that the strength of the black vote in general has been diluted. Because the plaintiffs do not allege that they "have a different private right not shared in common with the public," *Stromberg v. Board of Educ. of Bratenahl*, 64 Ohio St.2d 98, 18 O.O.3d 343, 413 N.E.2d 1184, 1186 (1980) (cited approvingly by *Richards*, ___ U.S. at ___, 116 S.Ct. at 1768), the plaintiffs raise an issue of public law, and thus the due process concerns attendant with a broad application of preclusion are lessened. *See Richards*, ___ U.S. at ___, 116 S.Ct. at 1768. Further, given the public nature of this case, if we held preclusion inapplicable, this case could "assume immortality," *Los Angeles Branch NAACP*, 750 F.2d at 741, and fence-sitting would be encouraged. *See supra*, Op. at 456.

The Miller plaintiffs contend that preclusion is inappropriate because the Aldermen plaintiffs did not adequately represent their interests at the first trial. They note that *458 counsel in the Aldermen-*AAVR* suit failed to file a formal motion in opposition to the summary judgment motion. Plaintiffs argue that absent an effective and diligent prosecution of the case at the first trial, virtual representation is inapplicable. We disagree.

As noted above, adequate representation is best viewed in terms of incentive to litigate. *See supra* note 7. The Aldermen plaintiffs had every incentive and opportunity to fully litigate the claims raised in the Aldermen-*AAVR* suit. No more is required. *See Simmons*, 77 F.3d at 1097 n. 4 (when assessing whether party had full opportunity and incentive to litigate case, there is no further require-

ment that plaintiff actually take advantage of that opportunity).

Given the factors counseling in favor of preclusion, we determine that the Aldermen plaintiffs adequately represented the interests of the Miller plaintiffs, and thus the two sets of plaintiffs are in privity. The Miller plaintiffs have vicariously had their day in court and their "one bite at the apple." As such, they are precluded from litigating those issues that were decided by the Aldermen-*AAVR* suit.[8]

III.

We conclude that the Aldermen plaintiffs adequately represented the interests of the Miller plaintiffs and thus

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[8] The Miller plaintiffs contend that preclusion is inapplicable in this case given the changes in voting rights jurisprudence occasioned by *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), and *Miller v. Johnson*, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), both decided after the filing of the complaint in the Aldermen-*AAVR* suit.

Although some courts have declined to apply preclusion principles given an intervening change in voting rights law, *see, e.g., Parnell v. Rapides Parish Sch. Bd.*, 563 F.2d 180, 185 (5th Cir.1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978), in this case there was no intervening legal change, as argued by the Miller plaintiffs. *Shaw* was decided on June 28, 1993. The first *AAVR* appeal was not decided until August 4, 1993, and the second appeal, following remand, was not handed down until nearly two years later, on May 12, 1995. Thus, any change in law occasioned by the *Shaw* opinion was fully available to the appellants in *AAVR*. As for *Johnson*, even though it was handed down after the appeal in *AAVR*, it is an extension of Shaw and thus does not constitute a sufficient intervening change in the law.

acted as their virtual representatives during the Aldermen-*AAVR* suit. As such, the Miller plaintiffs are precluded from relitigating those issues that were litigated in the Aldermen-*AAVR* suit. We affirm the district court's grant of summary judgment.

HENLEY, Senior Circuit Judge, concurring in the result.

The panel's opinion is very well written and seems to make the best of the arguments in favor of finding preclusion here. And, on balance, I agree with the panel's result: that the present case is barred by the previous litigation. Nevertheless, the case is a close one and I am uncomfortable with some of the panel's language. Accordingly, this brief statement of my reasons for concurring only in the result is tendered.

In general, I have some concern about how far we should go in extending preclusive effect to cases of so-called "virtual representation." As the panel points out, due process considerations provide an outer limit on the scope of preclusion. It is one thing to hold that a party in privity under principles of contract or property law should be bound by the results of prior litigation. It is quite another matter, however, to say that strangers to the prior litigation should be bound solely because they would raise the same issue or favor the same legal position.

More specifically, in this case, I believe it is a close question whether our result is fully consistent with the language and spirit of the Supreme Court's decision this

term in *Richards v. Jefferson County, Alabama*, ___ U.S. ___, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). In *Richards*, the Court held that a suit by persons employed in Jefferson County challenging the constitutionality of an occupation tax was not barred by principles of res judicata even though a prior suit (by the City of Birmingham and several individual taxpayers) had upheld the constitutionality of the same tax. The Court said that the taxpayers in the second suit could not be bound by the decision on the merits in the first suit, because ***459** they received neither "notice of, nor sufficient representation in" the prior litigation. ___ U.S. at ___, 116 S.Ct. at 1769.

The panel opinion does not directly address the issue of "notice" here and concludes that all that is necessary to satisfy the "sufficient representation" prong of *Richards* is that the plaintiffs in the first suit had the "incentive" to raise the same issues the parties in the second suit would raise. However, the Supreme Court's opinion appears to require something more than just incentive: "a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure . . . that the litigation is so conducted as to insure the *full and fair consideration* of the common issue.' " *Richards*, ___ U.S. at ___, 116 S.Ct. at 1767, quoting, *Hansberry v. Lee*, 311 U.S. 32, 43, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) (emphasis added).

Despite these misgivings about the proposition of "virtual representation" preclusion in general and some of the language of the panel's opinion, I believe that on the facts here, the requirements of "notice" and "sufficient representation" were satisfied. In particular, the plaintiffs in the second suit clearly were on notice of the first litigation, because some of them had also been plaintiffs

in the prior suit. Moreover, the same counsel represented plaintiffs in both actions. I believe that this identity of counsel and (at least some of the) plaintiffs also suggests that the "sufficient representation" requirement of due process was met. In addition, as the panel opinion points out, it appears that the principal reason for filing the second suit was to evade the judgment in the first suit.

It is noted, however, that the first suit was not filed as a class action, that the litigation was disposed of on motion for summary judgment, and that plaintiffs there filed only one affidavit and no brief opposing summary judgment. On these facts, it is not at all clear to me that under *Richards* a new plaintiff or group of plaintiffs—not on notice that their rights would be litigated in the first suit nor adequately represented there—would be barred from challenging the St. Louis districting plan even though there was a judgment on the merits in the first suit.

For the reasons stated, I concur in the result.

APPENDIX B

[Dated March 2, 1993]

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHARON TYUS, STERLING S. MILLER, IRVING CLAY, JR.; BERTHA MITCHEL, CLARENCE WOODRUFF, CLAUDE TAYLOR, PAULA J. CARTER, and FREEMAN BOSLEY, SR., individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 4:92 CV 00801 ELF
VINCENT C. SCHOEMEHL, THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS CITY, and CITY OF ST. LOUIS,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motions to dismiss filed by defendants Schoemehl, Villa, Board of Aldermen, and City of St. Louis; and on plaintiffs' motion for leave to amend complaint, motion for class certification, motion to cite additional authority, and motion for leave to file a surreply brief.

Plaintiffs' amended complaint is in two counts. Count I, brought pursuant to §2 of the Voting Rights Act of 1964, as amended, 42 U.S.C. §1973, alleges that the new St. Louis City ward map unlawfully dilutes the voting strength of St. Louis' African-American community and denies African-Americans an opportunity equal to white voters to elect the candidate of their choice. Count II alleges that defendants' actions in drawing the map were intentional and in violation of the Fourteenth and Fifteenth Amendments. Plaintiffs seek to represent a class of all African-American "residents, citizens, and voters" of the City of St. Louis.

Defendants' motion to dismiss[1] relies in part on the judgment for the defendants in *African American Voting Rights Legal Defense Fund, Inc., et al. v. Thomas A. Villa, et al.*, No. 4:92CV00044 JCH. In that case, Judge Hamilton granted the defendants' motion for summary judgment. With respect to the plaintiffs' constitutional claims, Judge Hamilton held that "the maximum deviation of 8.3% is well within the 10% allowed under the law." As to the plaintiffs' Voting Rights Act claim, Judge Hamilton held the defendants had demonstrated that "sustained electoral success by black candidates defeats Plaintiffs' claim." Defendants contend the judgment in *African American Voting Rights* is res judicata as to plaintiffs' claims in this case. Alternatively, they argue the claims are precluded by the doctrine of stare decisis.

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[1] By order filed December 30, 1992, the Court indicated it would treat the motion to dismiss as one for summary judgment with respect to the issue of res judicata. Accordingly, the parties were given time to file additional materials. In addition to the materials filed by the parties, the Court has taken judicial notice of the file in *African American Voting Rights*.

Additionally, defendants maintain the Board of Aldermen does not have the capacity to be a party to this lawsuit.

The doctrine of res judicata bars litigation of a claim if: 1) the prior judgment was rendered by a court of competent jurisdiction; 2) the decision was a final judgment on the merits; and 3) the same cause of action and the same parties or their privies were involved in both cases. *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987). Since some of the named plaintiffs in the amended complaint were not plaintiffs in *African American Voting Rights*, res judicata can bar their claims only if they were in privity with the plaintiffs in that case.[2] Defendants rely on the doctrine of virtual representation to contend they were.

Virtual representation expands the scope of res judicata by allowing the preclusion of parties not present in the first case, provided that someone present in the first case had the same interests as the absent party and so had every reason to prosecute or defend the case as vigorously. *Petit v. City of Chicago*, 766 F.Supp. 607, 611 (N.D.Ill. 1991). It is apparent, and plaintiffs do not contend otherwise, that the interests of the plaintiffs in the two cases are the same. Thus, the essential inquiry, as recognized by the parties, is whether plaintiffs were fairly and adequately represented in *African American Voting Rights*. *Gerrard v. Larsen*, 517 F.2d 1127, 1135 (8th Cir. 1975); *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 973 (5th Cir. 1986); *Petit*, 766 F.Supp. at 611. The Restate-

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[2] Plaintiffs do not argue that the claims of plaintiffs Tyus, Clay, Mitchell, Taylor, and Bosley are not barred by res judicata. The proposed second amended complaint drops them as named plaintiffs.

ment (Second) of Judgments states that a person is not bound by a judgment for or against a party who purports to represent that party if "[t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." Restatement (Second) of Judgments §42(e) (1982). Applying this standard, the Court finds that plaintiffs were adequately represented in *African American Voting Rights*. Accordingly, their claims are barred by the doctrine of res judicata.

Plaintiffs contend they were not adequately represented in *African American Voting Rights* because counsel in that case failed to file a brief in opposition to the defendants' motion for summary judgment. Additionally, plaintiffs characterize the affidavit that was filed as "confusi[ng] and largely unresponsive to defendants' motion" and assert that without a responsive memorandum the plaintiffs failed to address the defendants' "misleading legal and factual arguments."

The response filed by the plaintiffs in *African American Voting Rights* consisted of the affidavit of Dr. Charlene L. Jones, Ph.D., who identified herself as an expert witness for the plaintiffs. As plaintiffs note, a separate memorandum of law was not filed with this affidavit. Jones stated in the affidavit that she served as an expert witness in a Voting Rights Act case in the Western District of Missouri, Cause No. 91-1082-CV-W-2, which challenged the reapportionment plan for the Missouri House of Representatives. Plaintiffs have not challenged Jones's qualifications.

The Jones affidavit is ten pages long. As the parties and Judge Hamilton have noted, the affidavit includes both statements of fact and legal argument. Although the affidavit may be somewhat unconventional in form, it does contain both factual assertions and legal arguments and is, in substance, an appropriate response. Particularly noteworthy is Jones's assertion that the relevant population to consider with respect to the question of proportional representation is total population rather than voting age population. Jones also stated facts to support her opinion that blacks have been underrepresented on the Board of Aldermen in the past. Relying on total population, Jones stated that based on the 1970 census, black representation on the Board of Aldermen should have been eleven but was in fact only eight. Based on the 1980 census, black representation on the Board should have been thirteen but was in fact only eleven. This argument was in large part the basis of the plaintiffs' motion to alter or amend in *African American Voting Rights*, and is substantially relied upon by plaintiffs in their response to the motion to dismiss filed in this case. Thus, plaintiffs' argument that the *African American Voting Rights* plaintiffs failed to respond to "misleading" legal arguments is not supported by the record. Jones's affidavit did address the very issue which plaintiffs have identified as a key to both this case and *African American Voting Rights*.

Although plaintiffs contend the focus of the inquiry as to fair and adequate representation should be limited to the performance of counsel prior to Judge Hamilton's entry of summary judgment, the performance of counsel after that point is also significant. In *African American*

Voting Rights, case memoranda were submitted both in response to defendants' motion for summary judgment and with the motion to alter or amend.[3] The former memorandum was submitted subsequent to the filing of the affidavit of Dr. Jones, but leave to file it was denied by the court. The memorandum in support of the motion to alter or amend, however, was filed and contained virtually the same arguments and legal citations. That memorandum was well done and presented the plaintiffs' legal and factual positions. Consequently, plaintiffs' positions were fairly and adequately presented to Judge Hamilton. The fact that Judge Hamilton was not convinced does not mean plaintiffs' representation was inadequate.

For the reasons stated, the Court finds that plaintiffs were adequately represented in *African American Voting Rights*. Therefore, their claims are barred by the doctrine of res judicata. Defendants' motion to dismiss, construed by the Court as a motion for summary judgment with respect to the issue of res judicata, will be granted.[4]

Defendants' motion to dismiss filed on June 8, 1992, was directed to the original complaint. It is moot and will be denied as such.

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[3] The firm of Davis, Miner, Barnhill & Galland, of which plaintiffs' counsel is a member, was listed as of counsel in *African American Voting Rights* on both of these memoranda.

[4] Because the Court will grant defendants' motion based on the doctrine of res judicata, it will not address defendants' alternative argument that the Board of Aldermen is not an entity subject to suit and that any action against it must be brought in the names of the members of the board in their official capacities.

The Board of Election Commissioners states in its answer that it is not an entity which can be sued. Unlike the Board of Aldermen, it did not file a motion to dismiss raising that issue. The Court finds, however, that the Board of Election Commissioners is not an entity subject to suit and sua sponte will dismiss without prejudice plaintiffs' claims against it. *See Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991).

In *American Fire Alarm Co. v. Board of Police Comm'rs*, 227 S.W. 114 (Mo. 1920), the court held that the Board of Police Commissioners was not an entity subject to suit and that actions against the board must be brought in the names of the members of the board in their official capacities. The court's decision relied in large part on the fact that the board was not given the power by statute to sue or be sued. *Id.* at 120. Similarly, the Board of Election Commissioners has not been given that power. *See* Mo. Rev. Stat. §115.001 *et seq.* Therefore, the Court finds the Board of Election Commissioners is not an entity subject to suit and that any action against it must be brought in the names of the members of the board in their official capacities. The Court further finds dismissal proper since all other defendants, parties indispensable to plaintiffs' action, are dismissed by this order.

Accordingly, after careful consideration,

IT IS HEREBY ORDERED that defendants' motion to dismiss, as converted to a motion for summary judgment with respect to the issue of res judicata, is GRANTED.

IT IS FURTHER ORDERED that defendants' motion to dismiss filed on June 8, 1992, is DENIED as moot.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to amend complaint and motion for class certification are DENIED as moot.

IT IS FURTHER ORDERED that plaintiffs' motion to cite additional authority and motion for leave to file a surreply brief are GRANTED.

An appropriate judgment and order will accompany this memorandum and order.

Dated this 2nd day of March, 1993.

Edward L. Filippine
United States District Judge

B-9

[Dated March 2, 1993]

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SHARON TYUS, STERLING S. MILLER, IRVING CLAY, JR.; BERTHA MITCHEL, CLARENCE WOODRUFF, CLAUDE TAYLOR, PAULA J. CARTER, and FREEMAN BOSLEY, SR., individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 4:92 CV 00801 ELF
VINCENT C. SCHOEMEHL, THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS CITY, and CITY OF ST. LOUIS,	)	
Defendants.	)	

JUDGMENT AND ORDER

In accordance with the memorandum and order filed this date and incorporated herein,

IT IS HEREBY ORDERED AND ADJUDGED that defendants Schoemehl, Villa, Board of Aldermen, and City of St. Louis shall have judgment against plaintiffs and plaintiffs' claims for relief against those defendants are DISMISSED with prejudice.

IT IS FURTHER ORDERED that plaintiffs' claims against the Board of Election Commissioners are DISMISSED without prejudice.

Dated this 2nd day of March, 1993.

Edward L. Filippine
United States District Judge

Supreme Court, U.S.
FILED
FEB 26 1997
CLERK

No. 96-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STERLING S. MILLER; CLARENCE WOODRUFF; PAULA J. CARTER; WILLIAM L. CLAY, JR.; and KENNETH H. JONES,

Petitioners,

vs.

VINCENT C. SCHOEMEHL; THOMAS A. VILLA; BOARD OF ALDERMEN, CITY OF ST. LOUIS, MISSOURI; BOARD OF ELECTION COMMISSIONERS, CITY OF ST. LOUIS; and CITY OF ST. LOUIS,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS SCHOEMEHL, VILLA, BOARD OF ELECTION COMMISSIONERS, BOARD OF ALDERMEN AND THE CITY OF ST. LOUIS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents[1] Schoemehl, Villa, Board of Election Commissioners of the City of St. Louis, Board of Aldermen of the City of St. Louis, and the City of St. Louis respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 93 F.3d 449.

STATEMENT OF THE CASE

Petitioners' Statement of the Case and Questions Presented contain mischaracterizations as well as assertions of fact that do not appear in the record. Respondents in this opposition brief refute those mischaracterizations and assertions where they are of particular significance to this Court's consideration of the petition.

The plaintiffs in *African American Voting Rights Legal Defense Fund, Inc. v. Villa* (referred to as the *AAVR* case), No. 4:92 CV 0044 JCH (E.D. Mo. June 17, 1992) filed their lawsuit in January 1992, alleging the City of St. Louis' ward boundary lines for selecting alderpersons and political party committee persons, as re-drawn after the 1990 census, violated the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act, 42 U.S.C. § 1973. (App. 10-27.)[2] The named plaintiffs consisted of the

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[1] For the sake of clarity and consistency, Respondents will refer to the style of this petition in the same manner as Petitioners. Respondents note however, that in the Eighth Circuit decision below the case is styled as *Tyus v. Schoemehl*, and also that pursuant to Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 35.3, successors to the named public offices of Mayor and President of the Board of Aldermen should be automatically substituted as parties herein.

[2] References to the appendix filed in the Eighth Circuit are denoted as "App. ___.", and references to the Petitioners' appendix filed in this Court are denoted as "A-__ and B-__.".

African-American Voting Rights Legal Defense Fund, Inc. (a Missouri not-for-profit corporation) and various African-American residents of the City of St. Louis, including several elected alderpersons: Sharon Tyus, Freeman Bosley Sr., Bertha Mitchell, Claude Taylor, and Irving Clay, Jr. (App. 11-13.) The plaintiffs filed suit "on their own behalf and as a class action . . . on behalf of all black voters residing in the various wards of the City." (App. 13.)

On or about April 24, 1992, with a summary judgment motion pending against them, *AAVR* plaintiff-alderpersons Tyus, Bosley Sr., Mitchell, Taylor and Clay obtained new counsel, Mr. Judson Miner of the law firm of Davis, Miner, Barnhill & Galland. (App. 63-64.) Represented by Mr. Miner, these same plaintiffs — Tyus, Bosley Sr., Mitchell, Taylor and Clay — along with three additional persons, Sterling Miller (Ms. Tyus' spouse), Clarence Woodruff, and Paula Carter (an elected state representative), filed this second lawsuit, asserting the same claims as in *AAVR*. (App. 1-9; Eighth Circuit Rehearing Add. 1.) In this second suit, plaintiffs described themselves as "alderpersons of the City of St. Louis and/or are African American residents, citizens, and registered voters of the City," and they brought the suit "on their own behalf and on behalf of all African-American residents of St. Louis." (App. at 2.) At this point Mr. Miner served as counsel in both suits. (A-5.)

On May 5, 1992, Tyus, Bosley Sr., Mitchell, Taylor and Clay moved to withdraw from *AAVR* so that they could pursue their second lawsuit because of "certain disagreements regarding basic strategies with counsel" in *AAVR*. (App. 28-30.) On that same date, all plaintiffs in this second case filed a motion for reassignment based on relatedness, seeking to have the second suit reassigned to the district judge hearing *AAVR*, because the issues in the two cases were "virtually identical," the cases involved "the same issues in fact and law," and "the relief granted in one case will necessarily govern and control the relief

granted in the other." (App. 34-35.) Both motions were filed by counsel Mr. Miner.

In *AAVR*, the district court on June 17, 1992, granted summary judgment in favor of defendants, and denied the plaintiff-alderpersons' motion to withdraw as moot. The Eighth Circuit summarily affirmed, *AAVR v. Villa*, 999 F.2d 1301 (8th Cir. 1993) (Table) (per curiam), and denied rehearing. Several plaintiffs withdrew from *AAVR* at that point, but some appellants remained and sought a writ of certiorari, including alderpersons Tyus, Bosley Sr., Mitchell, Taylor and Clay, all represented by Mr. Miner. On the same date that this Court issued its opinion in *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), this Court granted the *AAVR* petitioners' request for certiorari, vacated the appellate court's judgment, and remanded for further consideration in light of *DeGrandy*. *Tyus v. Bosley*, 114 S.Ct. 2776 (1994). On reconsideration, the Eighth Circuit again affirmed, and then this Court denied certiorari. *AAVR v. Villa*, 54 F.3d 1345 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 913 (1996).

Meanwhile the district court in this second case had on March 3, 1993, granted summary judgment in favor of defendants Schoemehl, Villa, the Board of Aldermen, and the City of St. Louis on the ground of res judicata, and dismissed the claim against the Board of Election Commissioners as an entity not subject to suit.[3] (App. 112-20; B-1-8.) In its ruling, the district court also denied as moot plaintiffs' pending motion to file an amended complaint adding two additional persons as plaintiffs-- William Clay, Jr. (a state senator), and Kenneth Jones (an alderperson)-- and dropping as plaintiffs Tyus, Bosley Sr., Mitchell, Taylor, and Irving Clay. (App. 119; B-8.)[4] Plaintiffs

[3] The Board of Election Commissioners disputes that it is a proper party/ respondent in this action.

[4] Accordingly it is not clear that Petitioners William Clay, Jr. and Kenneth Jones have standing to bring this petition or that they were proper parties before the Eighth Circuit as they were never made parties below.

Miller, Woodruff, Carter, Jones, and William Clay appealed to the Eighth Circuit, which affirmed and denied rehearing. *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996).

Petitioners now request that this Court grant certiorari, arguing that the Eighth Circuit misapplied the doctrine of res judicata to bar them from relitigating issues identical to the ones decided in *AAVR*.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Application of the Doctrine of Res Judicata Under the Factual Circumstances Of This Case Neither Conflicts With Other Circuit Decisions Nor Is It Inconsistent With *Richards v. Jefferson County, Ala.*

In a twenty-four page opinion, the Eighth Circuit carefully and methodically applied the doctrine of res judicata to the unique factual circumstances at hand. The court concluded that issue preclusion prevented the plaintiffs from relitigating the issues previously decided in *AAVR* in that the plaintiffs in this case were "virtually" or "adequately" represented by the plaintiffs in *AAVR*. In so concluding, the Eighth Circuit noted that both suits raised "identical claims," that the issues raised in the second suit were actually litigated and decided in *AAVR*, and that accordingly the only question before it was whether the plaintiffs in the second suit were in privity with or adequately represented by the *AAVR* plaintiffs.[5] (A-1, 9-10.)

In undertaking an equitable and fact-intensive inquiry into privity or adequate representation, the court, contrary to petitioners' suggestion, did not enhance or create conflict with other circuits. While acknowledging that some circuits in their privity inquiries have applied the concept of virtual or adequate representation more broadly than others, the Eighth Circuit correctly noted that there can be no clear test in applying the concept due to its factually intensive nature. (A-12.) Rather, the court stated, it is wisest to apply the doctrine in light of the relevant factual context, weighing carefully the concerns of due process and judicial economy. (A-13.)

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[5] While Petitioners draw a distinction between privity and adequate representation, the Eighth Circuit's opinion characterizes adequate representation as one category of privity. (A-11.) Regardless, it is clear that adequate representation refers to an inquiry assessing the applicability of res judicata.

In its inquiry, the court followed "several guiding principles" of res judicata accepted in other courts. (A-15.) Petitioners' suggestion that the court should not have cited to *Petit v. City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991) is misplaced, as *Petit* is quite analogous to the instant case, and there is no basis for Petitioners' assertion that *Petit* is anything less than valid law. Similarly, Petitioners are simply wrong when they suggest that the Fifth Circuit has "abandoned" its reasoning from *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). On the contrary, the Fifth Circuit still recognizes the virtual representation principle, albeit more limitedly than originally stated, and still cites *Aerojet* for the applicable legal standard. *See Meza v. General Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990).

Further, in its opinion below, the Eighth Circuit was particularly mindful of *Richards v. Jefferson County Ala.*, __ U.S. __, 116 S. Ct. 1761 (1996). The court expressly recognized the due process concerns articulated in *Richards*, distinguished *Richards* as a case in which the parties to the two lawsuits were "mere 'strangers' to one another," and determined *Richards* to be inapposite where there is the type of relationship between the parties as found in this case. (A-13-14.) Indeed, *Richards* recognizes that privity extends to describe various relationships that would not have come within the traditional definition of the term. 116 S.Ct at 1766. Moreover, *Richards* addressed a situation where the second group of plaintiffs, whose interests were not necessarily aligned with the first group of plaintiffs, sought to litigate new and different federal claims that had not been raised or litigated in the prior suit. *Id.* Finally, contrary to petitioners' assertion, this case would not present any question left unanswered in *Richards* regarding the necessity of notice of the prior litigation, as the court below concluded the plaintiffs in this suit were on notice of the first suit; indeed certain of the plaintiffs were parties to the first suit. (A-19, 24).

II. The Petition Should Be Denied Because Petitioners' Allegation That They Were Denied Due Process Does Not Justify A Grant of Certiorari Where the Eighth Circuit Properly Applied the Doctrine of Res Judicata Under the Factual Circumstances of This Case To Bar Petitioners From Relitigating Claims and Issues Identical to Those Decided In a Prior Case Which Included Many of the Same Plaintiffs, the Same Counsel, and Other Plaintiffs With Identical Interests.

Petitioners also contend that this Court should grant certiorari because they were deprived of due process in that they and the issues they raise deserve another day in court. This portion of the Petition for Certiorari is essentially a rehash of Petitioners' argument to the Eighth Circuit that they were not adequately represented in the first suit.

As explained in Respondents' statement of the case, as well as in the Eighth Circuit opinion below, this is a case in which a group of plaintiffs, with a summary judgment motion pending against them in federal court, opted to file a second simultaneous lawsuit in federal court raising identical claims and issues. Three additional plaintiffs, all situated similarly to plaintiffs in the first suit, joined in the filing of the second suit. As the record below evinces, and as the Eighth Circuit recognized in its decision, the principal reason for filing the second lawsuit was as a "tactical maneuver"–"to evade judgment in the first suit." (A-19, 24.) Five of the plaintiffs in this second suit were *AAVR* plaintiffs who deliberately maneuvered to avoid the first suit once it became apparent that they might not prevail. Counsel from Spring of 1992 forward was the same in both suits. All plaintiffs in the second suit sought to have their case reassigned to the district judge presiding over *AAVR* because the issues were "identical" and the outcome of one suit would "necessarily govern" the outcome of the other. (App. 34-35.)

This scenario certainly involves a unique application of virtual or adequate representation principles which is not likely to recur, and this Court's review of whether these Petitioners deserve to maneuver another day in court would not serve any need among the courts for guidance on res judicata doctrines.

III. The Petition Should Be Denied Because Petitioners' Asserted "Questions Presented For Review" Would Not Actually Be Presented To This Court In That The Asserted Questions Are Premised On Factual Scenarios Not Present In This Case

Petitioners' asserted Questions Presented would not be before this Court as the Eighth Circuit did not apply res judicata against a factual scenario like the one premised in Petitioners' Questions. Petitioners attempt to mischaracterize the factual scenario as one in which they had no relationship to the plaintiffs in the prior *AAVR* litigation and had no notice of the *AAVR* suit. (Petition for cert. at i.) These assertions are contrary to the lower courts' conclusions and are not supported by the record, as explained in Respondents' arguments above.

Similarly, Petitioners' assertion that this case is one in which the prior litigation was not prosecuted with "due diligence and reasonable prudence" (petition for cert. at i), is unsupported in the record and was not a conclusion reached by either of the lower courts. (See B-5-6.) In fact, Petitioners' counsel Mr. Miner pursued the first suit through appeals which extended into 1996. This line of argument amounts to nothing more than yet another rehash of Petitioners' hindsight assessment of and dissatisfaction with the ultimate outcome of *AAVR*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STERLING S. MILLER; CLARENCE WOODRUFF; PAULA J. CARTER; WILLIAM L. CLAY, JR.; and KENNETH JONES,

Petitioners,

v.

VINCENT C. SCHOEMEHL, THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, BOARD OF ELECTION COMMISSIONERS OF ST. LOUIS CITY, and CITY OF ST. LOUIS, a municipal corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

There is no right more fundamental in Anglo-American jurisprudence than the right to be heard, the right to have "one's day in court." None of the petitioners was a party to the prior, ostensibly precluding, litigation, and their attempt to participate in that litigation through a motion to consolidate was opposed by defendants and denied by the trial court. Nevertheless, the Eighth Circuit held that these "strangers" to the prior litigation are barred by *res judicata* from pursuing their own lawsuit. This is an unprecedented application of *res judicata* to a nonparty, and it was accomplished under the rubric of "virtual representation," a theory over which the courts are in conflict and which raises fundamental due process issues. Respondents' unwillingness to confront these issues candidly or to even attempt to defend the Eighth Circuit's decision on its own terms is clear testimony to the need for review by this Court.[1]

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[1] Respondents question, for the first time and without supporting argument (RB at 3 n.4), whether petitioners Clay and Jones were proper parties before the Eighth Circuit or have "standing" to join in this petition, because the trial court denied as moot the *Miller* plaintiffs' motion to file an amended complaint that, *inter alia*, added them as named plaintiffs. We note, first, that petitioners appealed the trial court's order (119-21), and second, that respondents do not question the standing of the other three petitioners, Miller, Woodruff, and Carter.

A. AS THE EIGHTH CIRCUIT CORRECTLY STATES, THE CIRCUITS ARE "SHARPLY DIVIDED" AS TO THE CONSTITUTIONALITY AND SCOPE OF "VIRTUAL REPRESENTATION" AS A STANDARD FOR NONPARTY PRECLUSION.

Respondents assert that the decision below "did not enhance or create conflict with other circuits" (RB at 5). This suggestion is frivolous. The Eighth Circuit itself explicitly acknowledges that the courts are "sharply divided" over the scope and constitutionality of the theory of virtual representation as a standard for nonparty preclusion (App. A-12). The split is fully discussed in the Petition (at 11-15), and in the majority opinion below (App. A-11-13). To reiterate briefly, the threshold question over which the circuits are divided is whether

> [v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues.

Pollard v. Cockrell, 578 F.2d 1002, 1008 (5th Cir. 1978). The Eighth Circuit expressly rejected the other circuits' requirement of an express or implied legal relationship of accountability, opting instead for a standardless inquiry into whether *res judicata* applies (App. A-12). None of the petitioners has the kind of express or implied relationship of accountability with a party to the *AAVR* lawsuit that the other circuits have required. *See* Petition at 13-14.

Thus, this case presents a pure legal issue, over which the circuits are sharply divided, namely, whether, under the theory of "virtual representation," the federal common law doctrine of *res judicata* can bar a plaintiff from pursuing a claim that was litigated in a prior proceeding

where the plaintiff was neither a party nor in a legal relationship of accountability with a party to the prior proceeding. Respondents' brief does not address this issue. Instead, respondents seize on the Eighth Circuit's standardless approach to argue that it can somehow be limited to the facts of this case (RB at 5, 8). To the contrary, the Eighth Circuit's approach applies whenever the interests of the two parties are ostensibly aligned. Indeed, it is the recognition of this fact that caused the Fifth Circuit in *Pollard* to abandon its initial broad application of the theory of virtual representation as being inherently in conflict with due process.[2]

In sum, this case is not about the factual application of the doctrine of *res judicata*, it is about the governing legal and constitutional standards for applying the doctrine.

B. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONERS WERE ADEQUATELY REPRESENTED IN THE *AAVR* LAWSUIT BECAUSE THE *AAVR* PLAINTIFFS HAD AN INCENTIVE TO LITIGATE THEIR COMMON CLAIMS, DESPITE THE FACT THAT THEY FAILED TO DO SO WITH DUE DILIGENCE, IS AT ODDS WITH THE TEACHINGS OF THIS COURT SINCE *HANSBERRY v. LEE*.

Even if the Eighth Circuit were correct in holding that a plaintiff can be bound by a prior judgment despite the fact that he or she was neither a party nor in a legal

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[2] Respondents' superficial treatment of the applicable law in the Fifth Circuit (RB at 6) disregards *Pollard, supra*, which explicitly limited the broad holding of *Aerojet* on which respondents rely.

relationship of accountability with a party to the prior lawsuit, due process requires that the plaintiff's interests be "adequately represented" in the prior lawsuit. The standard articulated by this Court is that the prior litigation must have been "so conducted as to insure the full and fair consideration of the common issue." *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). The majority opinion ignored *Hansberry* and its progeny and concluded that adequacy of representation exists when "the interests of the two parties are very closely aligned and the first party had a *strong incentive* to protect the interests of the second party" (App. A-16, 20).

Respondents make no attempt to defend or support the Eighth Circuit's "incentive to litigate" standard. Instead, they contend that there is no basis for petitioners' position that the prior lawsuit was not prosecuted "with due diligence and reasonable prudence" (RB at 8). Their contention is contradicted by the same Eighth Circuit panel's finding, in the *AAVR* appeal, that the neglectful failure of the original lawyers to file a memorandum and appropriate documentation in response to defendants' summary judgment motion was not "excusable." *African American Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1350-51 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 913 (1996). That finding necessarily means that the original lawyers did not prosecute the case with due diligence and reasonable prudence.

Respondents also assert that petitioners were adequately represented by the *AAVR* plaintiffs because their counsel "pursued the first suit through appeals" (RB at 8). The courts have uniformly held, however, that the presence of common counsel is not a basis for invoking

res judicata.[3] *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); *Pollard v. Cockrell*, 578 F.2d 1002, 1009 (5th Cir. 1978); *Petit v. City of Chicago*, 766 F.Supp. 607, 611-12 (N.D.Ill. 1991).

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[3] In an effort to divert attention from the constitutional issues presented in this case, respondents raise factual matters that are simply irrelevant. First, Mr. Miner was not counsel in *AAVR* when this lawsuit was filed, as respondents state (RB at 2). *See* Petition at 3-5. But, as the cases cited in the text make clear, it would not matter if he had been. Second, as the majority opinion correctly observed, the admitted purpose of the Bosley plaintiffs in joining the *Miller* action was to "circumvent trial strategy disagreements" and a conflict with their initial attorneys (App. A-19; *see* Petition at 3), not, as respondents assert, to "evade judgment in the first suit" (RB at 7). This action was in fact filed before the motion for summary judgment in *AAVR* had even been briefed. However, even if the Bosley plaintiffs had joined this action to evade the result in *AAVR*, it is irrelevant to the question whether *res judicata* was properly applied *to petitioners*, none of whom was at any time a party to *AAVR* and who attempted to consolidate the two cases. *Cf. Gonzalez v. Banco Cent. Corp.*, 17 F.3d 751 (1st Cir. 1994) (*res judicata* under virtual representation theory inappropriate where plaintiffs' attempt to join the first litigation was opposed by defendants and denied by the trial court, even though the same counsel represented plaintiffs in both actions).

C. IF PLAINTIFFS CAN BE BARRED FROM PURSUING A CLAIM BECAUSE IT WAS LITIGATED IN A PRIOR PROCEEDING BY PARTIES WITH WHOM THEY HAD NO LEGAL RELATIONSHIP OF ACCOUNTABILITY AND WHO FAILED TO PROSECUTE WITH DUE DILIGENCE AND REASONABLE PRUDENCE, THEN DUE PROCESS DEMANDS THAT THE PLAINTIFFS FIRST RECEIVE NOTICE THAT THE PRIOR PROCEEDING WOULD CONCLUSIVELY DETERMINE THEIR RIGHTS AND BE GIVEN THE OPPORTUNITY TO JOIN IN OR OPT OUT OF THE LAWSUIT.

It is undisputed that none of the petitioners received notice that their rights were to be adjudicated in *AAVR*. Although the case was filed as a class action, no class was certified; indeed, no motion to certify a class was even filed. It is also undisputed that petitioners had neither an opportunity to choose not to be represented by the *AAVR* plaintiffs (that is, to "opt out") nor an opportunity to participate in the litigation (their motion to consolidate the two cases was opposed by respondents and denied by the district court). The Eighth Circuit nevertheless held that petitioners received constitutionally sufficient notice of the prior proceeding because they were aware that the lawsuit existed. This holding cannot be reconciled with *Martin v. Wilks*, 490 U.S. 755, 763 (1989), which holds that awareness of a pending lawsuit is not of itself notice adequate to bind an absent party. *See* Petition at 18. Respondents do not even attempt to argue otherwise (RB at 6).

Thus, if "virtual representation" and "the incentive to litigate" are constitutionally adequate representation, as the Eighth Circuit holds, then this case presents the question left unanswered in *Richards v. Jefferson Coun-*

ty, Ala., ___ U.S. ___, 116 S.Ct. 1761, 1766-67 (1996), namely, whether adequate representation can excuse a lack of notice, and, if not, what kind of notice is required.

The issue of whether petitioners can be bound by a prior judgment without notice and the opportunity to either opt in or opt out presents the fundamental due process issue that this Court sought to address in *Adams v. Robertson*, 95-1873 (March 3, 1997) (dismissing writ because issue not properly raised below), and *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing writ because issue was entirely hypothetical in that case). As this Court noted in *Adams*, the Court has a "continuing interest" (*Adams*, slip op. at 4, n. 6) in resolving the recurring constitutional issue of an individual's right not to be bound by an action to which he is, in no sense, a party. This case presents an excellent vehicle for resolving it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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